IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

TERRY L. MILLER,

Plaintiff,

No. 4:07-cv-0292-JAJ

VS.

MICHAEL J. ASTRUE, Commissioner of Social Security,

Defendant.

ORDER

This matter comes before the court pursuant to briefs on the merits of this application for Social Security disability and disability insurance benefits. This court finds that the decision of the Social Security Administration is supported by substantial evidence. This case is dismissed.

I. PROCEDURAL BACKGROUND

Plaintiff Terry Lynn Miller (hereinafter "Miller") protectively filed an application for disability and disability insurance benefits on December 15, 2004, alleging an inability to work from May 7, 2000 (Tr. 58-63A). Miller's insured status ended on June 24, 2004 (Tr. 14). The Social Security Administration ("SSA") denied Miller's application initially and again upon reconsideration (Tr. 38-57). Administrative Law Judge ("ALJ") Andrew T. Palestini held a hearing on Miller's claim on April 6, 2006 (Tr. 396-422). The ALJ denied Miller's appeal on September 26, 2006 (Tr. 14-20). Miller filed a request for review on October 17, 2006 (Tr. 10). The Appeals Council denied his request for review on May 30, 2007 (Tr. 6-8). Miller filed this action for judicial review on July 3, 2007 (Dkt. 1).

II. FACTUAL BACKGROUND

At the time of the hearing, Miller was 58 years old. He was 53 at the time of his alleged disability onset date. Miller has completed high school and one and a half years of

college. His vocationally relevant work experience includes work as a project manager for a construction business. Miller alleges disability due to advanced disk degeneration and stenosis since May 7, 2000. Miller was not employed on that date. He sold his ownership shares in a general contracting company on December 31, 1999, and was in the process of deciding his future employment on May 7, 2000.

A. Relevant Medical History

In 1979, Miller underwent a discectomy at L4-5 performed by Dr. Dykstra in Iowa City, Iowa (Tr. 310, 380).

On May 7, 2000, Miller fractured his left calcaneus in a fall down a flight of stairs in his home (Tr. 400). Miller was admitted to the hospital on May 8, 2000, where he underwent an open reduction of the fracture on May 11, 2000 (Tr. 185). Dr. Michael W. Hendricks, M.D., performed the surgery (Tr. 188). In May of 2000, Miller had his first appointment with chiropractor Dr. Jeff A. Pence, DC CCSP CSCS (Tr. 270).

On October 10, 2000, Miller sought treatment from his family physician, Dr. Robert Hinnen, M.D., for low back pain radiating down the left leg (Tr. 325). Miller attributed the pain to overexertion in the past week (Tr. 325). Dr. Hinnen noted mild tenderness in the lumbar spine (Tr. 325). Dr. Hinnen noted that Miller's left patellar reflex was slightly diminished when compared to the right (Tr. 235). Miller was able to bend forward 80 degrees, backward 10 degrees and laterally 20 degrees (Tr. 325). Dr. Hinnen prescribed physical therapy three times weekly, the muscle relaxant Skelaxin, and heat or ice treatment for Miller's back (Tr. 325).

On October 16, 2000, Miller was seen by Dr. Hinnen for worsening back pain with complaints of numbness in his left leg and foot (Tr. 324). Dr. Hinnen noted mild tenderness in the lumbar spine (Tr. 324). Miller was able to bend forward 90 degrees, backward 10 degrees and laterally 10 degrees (Tr. 324). His DTRs were diminished symmetrically and his straight leg raise was positive on the left at 35 degrees and negative

on the right (Tr. 324). An X-ray of Miller's spine showed marked degenerative changes at L5-S1 (Tr. 324). Dr. Hinnen ordered an MRI of Miller's lumbar spine (Tr. 324).

On October 18, 2000, Miller underwent an MRI of his lumbar spine (Tr. 203-04). On October 23, 2000, Dr. Hinnen informed Miller that the MRI results showed that he had a herniated disc at L5-S1 (Tr. 324). The MRI showed:

- 1. Evidence of a insufficiency fracture, stress reaction, or stress fracture in the left sacral ala on T1 weighted coronal image four and post-gadolinium axial images 10 and 11.
- 2. Moderate chronic appearing broad based central posterior disc herniation at L5-S1 with a moderate central and bilateral subarticular recess stenosis. There is impingement on both S1 nerve roots with post-gadolinium enhancement of the left S1 pre-ganglionic segment, compatible with radiculitis probably due to impingement.
- 3. Advanced disc degeneration at L4-L5 with mild central and bilateral subarticular recess stenosis. Status post laminectomy on the left at L4 as well.

(Tr. 203-04). Per Miller's request, Dr. Hinnen referred him to Steindler Orthopedic Clinic, P.C. (Tr. 324). Miller received epidural steroid injections to his lumbar spine on October 25, 2000, November 1, November 15, 2000, and December 29, 2000 (Tr. 152, 253, 255, 257).

On January 10, 2001, Miller was seen by Dr. Wayne E. Janda, M.D., at the Steindler Orthopedic Clinic (Tr. 152-54). Miller complained of "left leg pain with tingling, tightness, and numbness." (Tr. 152). Upon examination, Dr. Janda noted that Miller exhibited satisfactory transfers and gait, a "weak-leg limp favoring the left leg." (Tr. 153). Miller had atrophy in left calf and thigh, an absent left ankle reflex, weakness in the dorsiflexors and plantar flexors of left foot, and weakness in left hamstring (Tr. 153). Miller had pain with extension and in prone position, and soreness and tenderness in the left side of his lower back and in the left buttocks (Tr. 153). Miller's back motions

were restricted to forward bending of 30 degrees with pain, extension of 5 degrees, and moderately restricted lateral bending and rotation (Tr. 153). Dr. Janda recommended a bone scan to determine the presence of a stress fracture or reaction in sacrum and EMG/NCVs for the lower left extremity to determine if there is S1 radiculopathy (Tr. 154).

On January 22, 2001, Dr. Hendricks wrote a letter indicating that Miller was in need of a handicap tag for six months due to a temporary disability of inability to ambulate "any distances" (Tr. 169). In January of 2001, Miller underwent both sets of tests recommended by Dr. Janda (Tr. 151). The bone scan revealed changes on the right side of the lumbar spine and no evidence of stress fracture of sacrum (Tr. 151). The EMG/NCVs revealed "definite left S1 radiculopathy, some changes at L5 as well, but are mild[.]" and the absence of left sural sensory due to prior surgery on ankle (Tr. 151). Dr. Janda recommended "conservative care" by increasing Miller's dosage of the anti-inflammatory Vioxx, taper off the pain reliever Ultram, and continued use of Skelaxin (Tr. 151). On February 6, 2001, Miller received an epidural steroid injection (Tr. 141-42).

On February 16, 2001, Miller was seen by Dr. Janda in a follow-up appointment (Tr. 149). Dr. Janda noted that Miller had "good results" and "is a lot better[.]" after having the epidural steroid injection (Tr. 149). Dr. Janda noted that Miller was off of all pain medications and taking only Skelaxin and a muscle relaxer (Tr. 151). Upon examination, Miller's gait and transfer were satisfactory, he did not have "any down-the-leg pain." (Tr. 149). Dr. Janda later noted that Miller is having "down-the-leg" pain, but that "it is not intense[,]" "only goes to his thigh and is not anything sharp." (Tr. 149). Miller walked with a slight limp and was able to do a knee-bend-squat (Tr. 149). Dr. Janda recommended continuing with "conservative care" and limited his lifting and push/pull to 20 lbs (Tr. 149). Dr. Janda encouraged Miller to walk and avoid bending and scheduled Miller for a follow-up in three months (Tr. 149).

On March 12, 2001, Miller was seen by Dr. Keith A. Bengston, M.D., at the Mayo Hospital Spine Center for lower extremity weakness (Tr. 158-59). Dr. Bengston noted that Miller was a self-referral (Tr. 158). Miller complained of "minimal low back pain and feels like a 'knot' in the mid lumbar spine with left greater than right lower extremity weakness and numbness in the whole left foot." (Tr. 158). He complained that symptoms worsened with prolonged sitting and improved with walking, but stated that he could walk no longer than five minutes (Tr. 158). Upon examination, Dr. Bengston noted that Miller "moves easily and exhibits no pain behaviors[,]" had a normal gait, and full and pain-free lumbar active range of motion (Tr. 159). Miller was unable to toe walk on the left side and a difficult time with heel walk on left side (Tr. 159). Miller had a negative straight leg raise bilaterally to 90 degrees (Tr. 159). Dr. Bengston noted that Miller had "very thin lower extremities" with "asymmetry with atrophy on left calf muscle compared with right" and "a negative one weakness of the right gastroc soleus, toe flexors, and hamstring muscles." (Tr. 159). Dr. Bengston also noted that Miller had "decreased sensation to light touch from the lateral malleoulus distally into the lateral foot on the left." (Tr. 159).

Dr. Bengston diagnosed Miller with "Left S1 greater than L5 radiculopathy likely secondary to a resolving L5-S1 disc herniation." (Tr. 159). He recommended that Miller "at some time" pursue a bone densitometry to assess bone strength, and if symptoms do not resolve, to repeat EMG to look for "more wide spread [sic] neuropathic process" and undergo blood tests to look for metabolic disease (Tr. 159). Dr. Bengston stated:

In the meantime, this all seems quite compatible with a simple disc herniation and resolving radiculopathies. I would suggest a gradually increasing exercise program. I have written him a prescription for strengthening of the left lower extremity as well as dynamic lumbar stabilization.

(Tr. 159). Dr. Bengston did not schedule a follow-up appointment with Miller (Tr. 159).

On May 16, 2001, Miller saw Dr. Janda for his three-month follow-up appointment for his SI radiculopathy (Tr. 148). Dr. Janda reported that Miller had the same symptoms

as previous appointments (Tr. 148). Dr. Janda noted that Miller had satisfactory transfers and gait that were pain-free, his lumbar flexibility was mildly to moderately restricted, and had a "fair amount" of muscle tightness with some stiffness (Tr. 148). Dr. Janda noted that "[t]here is not much in the way of guarding." (Tr. 148). Dr. Janda recommended that Miller do back exercises and gave him a booklet outlining a 15-minute workout to be performed three to five times weekly (Tr. 148). Dr. Janda cautioned Miller to be careful while performing extension exercises and recommended that he not undergo any more chiropractic care for three months (Tr. 148). He told Miller that he could discontinue use of Vioxx and scheduled Miller for a follow-up appointment in three months (Tr. 148).

On July 19, 2001, Miller was seen by Dr. Janda for his three-month follow-up appointment for his SI radiculopathy (Tr. 147). Dr. Janda noted that Miller reported he was "having difficulty." (Tr. 147). Upon examination, Dr. Janda noted that Miller had a weak-leg limp favoring the left leg, that he had atrophy in the calves, and that his left ankle reflex was absent (Tr. 147). Dr. Janda stated that he wanted Miller to see a spine surgeon before he prescribed another epidural steroid injection (Tr. 147).

On August 3, 2001, Miller was seen by Dr. Edward G. Lash, M.D., for a surgical consultation regarding his lower back pain (Tr. 145). Dr. Lash noted that Miller's "major problem at this time is low back pain and left foot numbness." (Tr. 146). Upon examination, Dr. Lash noted that Miller had a normal overall gait pattern, a straight spine with flattening of his lumbar curvature, and was able to forward flex to get his fingertips to the level of his shin (Tr. 145). Dr. Lash noted that Miller was able to toe walk, no ankle jerks, and no knee jerks (Tr. 145). Dr. Lash noted that Miller had mild weakness of his "left EHL" and "weakness that looks likes to [sic] heel walking on the left side (Tr. 145). Based upon his evaluation, Dr. Lash "discouraged [Miller] from undergoing spine surgery for this problem" because "these are complaints that would [not] be easily solved by a spine surgery." (Tr. 146).

On September 11, 2001, Miller underwent a bone scan that showed he was "borderline osteoporotic through the left femoral neck and is at increased risk for fracture." (Tr. 201). On December 6, 2001, Dr. Hendricks wrote a letter indicating that Miller was in need of a handicap tag for six months due to a temporary disability of inability to ambulate "long distances." (Tr. 166). On December 11, 2001, Miller was seen by Dr. Hinnen for a routine physical (Tr. 321). Miller reported to Dr. Hinnen that "his back is about the same" and that he was aware he should perform back exercises (Tr. 321). Upon examination, Dr. Hinnen noted that Miller's back was mildly tender at the lumbar spine (Tr. 321). Dr. Miller recommended back exercises and noted that he planned to see Miller on annual basis (Tr. 321).

On November 26, 2002, Miller was seen by Dr. Hinnen for a routine physical (Tr. 320). Dr. Hinnen noted that Miller had "chronic problems" with low back and left foot (Tr. 320). Miller was seen by Dr. Hinnen on November 20, 2003, December 3, 2003, May 7, 2004, September 23, 2004, October 27, 2004, December 8, 2004, and September 27, 2005 for several complaints including joint pain and swelling in his hands and pain in his left ribs (Tr. 313-19). Dr. Hinnen did not report that Miller complained about chronic low back pain or numbness in left foot during any of these visits (Tr. 313-19). At the December 8, 2004 appointment, Dr. Hinnen noted that Miller's back was "nontender." (Tr. 315).

Miller sought spinal manipulation for his lower back pain from chiropractor Dr. Pence on an as needed basis from May of 2000 to September of 2004 (Tr. 270). Dr. Pence diagnosed Miller with chronic low back pain secondary to failed low back surgery (Tr. 270).

On March 29, 2005, Miller is seen by Dr. Hinnen for complaints regarding his hands turning white during cold weather (Tr. 369). A cold immersion test of Miller's hands conducted on April 4, 2005, revealed that Miller suffered from Raynaud's phenomenon (Tr. 369-72).

On September 12, 2005, Miller underwent an MRI performed by Dr. Pence (Tr. 376). The MRI showed "degenerative disc disease at L4-5 and L5-S1 with disc bulging and tear of the annulus at L5-S1 causing central canal and neural foraminal stenosis from the disc bulging." (Tr. 376).

On October 7, 2005, per a referral by Dr. Pence, Miller was seen by Dr. Chad D. Abernathey, M.D. for a consultation regarding possible treatment options of his chronic low back pain (Tr. 380-81). Dr. Abernathey stated that Miller's MRIs from 2000 and 2005 demonstrate "focal L4-L5 disc degeneration with osteophyte formation and neuroforaminal stenosis, as well as diffuse degenerative changes at multiple levels." (Tr. 380). Dr. Abernathey discussed treatment options with Miller and his wife, and referred them to Dr. Loren J. Muow. M.D., for surgical consultation (Tr. 380-81). Dr. Abernathey reported that Miller may benefit from a decompression/fusion procedure (Tr. 381).

On October 18, 2005, Miller was seen by Dr. Muow for a surgical consultation (Tr. 378). Upon review of Miller's MRI results, Dr. Muow reported that Miller had a disc space collapse at L4-L5 (Tr. 378). Dr. Muow recommended conservative treatment measures for Miller and did not recommend surgical intervention at that time (Tr. 378).

B. Plaintiff's Subjective Complaints

Miller completed disability reports on December 27, 2004, a personal pain/fatigue questionnaire and a function report on January 6, 2005, a disability report appeal on March 31, 2005, a function report and a personal pain/fatigue on May 9, 2005, and disability report appeal on September 20, 2005 (Tr. 79-86; 94-96; 97-100; 101-08; 109-15; 116-23; 124-27; 128-34).

In his initial disability report, Miller identified his condition as advanced disc degeneration and stenosis, and stated that he "can't do anything for any duration at all. There is discomfort there." (Tr. 79-80). In his initial personal pain fatigue questionnaire, Miller stated that he has radiating pain in his "low to mid back" that is "dull to aching"

and numbness in his left leg and foot that he experiences every day (Tr. 97). Miller stated that his pain was aggravated by "prolonged movement of any type" and cold weather and was worse during the late afternoon and evening (Tr. 97). Miller stated that the pain "limits me in everything that I do - I have to carfull [sic] in everything - It is always on your mind." (Tr. 98). Miller stated that he can walk one to two blocks, stand for 15 to 30 minutes, and sit one to two hours (Tr. 100). In his initial function report, Miller reported that he performed minor home repairs and mowed the lawn on a riding law mower for approximately 30 to 45 minutes weekly (Tr. 103). He stated that his condition affects his ability to lift, squat, bend, stand, walk, sit, kneel, stair climb, and get along with others (Tr. 106).

In his disability appeal, Miller stated that he experiences increased numbness and weakness in left leg and foot, rheumatoid arthritis in the left hand, and decreasing ability to use his left hand (Tr. 109). In his second function report, Miller again reported mowing the lawn on a riding lawn mower for about 30 minutes and doing minor home repairs (Tr. 118). Miller stated that his condition affects his ability to lift, squat, bend, stand, walk, sit, kneel, stair climb, complete tasks, and use hands (Tr. 121). In his second personal pain/fatigue questionnaire, Miller described his pain as, "low back - severe, aching to sharp, left leg and foot - dull ache, numbness and tingling, right hand - arthritic - pain varies" (Tr. 124). Miller reported that he experiences pain "pretty much all the time" and that the pain has worsened (Tr. 125). He stated that his pain is "limiting in every way" and at times affects his ability to think and concentrate (Tr. 125-26).

In his second disability appeal, Miller reported that he had been diagnosed with rheumatoid arthritis since completing his last disability report (Tr. 128). Miller stated that he "experiences pain, is slowed, and more limited than in the past." (Tr. 132).

C. Residual Functional Capacity

On September 20, 2004, Dr. Pence completed a "Return to Work Recommendations" worksheet for Miller for Prudential Financial Insurance Company (Tr.

272). He stated that Miller was unable to work at this time and would be reevaluated on a "TRN Basis" (Tr. 272). Dr. Pence stated that Miller had a lifting limit of 10-20 lbs., a standing/walking limit of 1-2 hours daily, and that Miller must avoid repetitive bending, carrying, squatting, stooping, climbing, pushing, pulling, and twisting (Tr. 272). Dr. Pence provided no limitations on sitting or driving for Miller (Tr. 272).

On October 5, 2004, Dr. Pence completed a physician questionnaire for Prudential Financial Insurance Company (Tr. 267-71). Dr. Pence stated that Miller's condition was "chronic, degenerative" and "permanent." (Tr. 268). Dr. Pence stated that "structural instability of [the] lumbar spine" prevented Miller from working in gainful employment (Tr. 268). In response to the question "Having in mind the patients' education, training, experience & limitations: What type of future employment could the patient obtain", Dr. Pence answered that Miller would be able to obtain employment in "sedentary management positions - however sitting, standing, and [illegible] [illegible] limited due to disability." (Tr. 268). Dr. Pence stated that Miller had a "poor" prognosis (Tr. 268).

On February 2, 2005, Dr. Jan Hunter, D.O., a state agency physician, completed a Residual Functioning Capacity Assessment for Miller (Tr. 302-09). Dr. Hunter found that Miller could occasionally lift 20 lbs., frequently lift 10 lbs., stand or walk with normal breaks for at least two hours of an eight-hour workday, sit with normal breaks for about six hours in an eight-hour workday, and push or pull, including operation of hand and/or foot controls, for an unlimited amount of time daily (Tr. 303). Dr. Hunter found that Miller could climb, balance, stoop, kneel, crouch, or crawl occasionally (Tr. 304). Dr. Hunter placed no limitation in Miller's ability to manipulate objects and found that Miller had no visual, communicative, or environmental limitations (Tr. 305-06). Dr. Hunter stated that she had given consideration to Dr. Pence's statement of disability for Miller, but had not given it controlling weight because a chiropractor is not an acceptable treating source (Tr. 310). Dr. Hunter concluded that "the claimant's current activities of daily

living are consistent with sedentary types of activity, and this is reflected in the RFC assessment provided herein." (Tr. 311).

Miller underwent a vocational analysis conducted by Kent A. Jayne, a vocational expert, on August 26, 2006 (Tr. 385-95). This analysis occurred after the hearing on April 6, 2006, but before the ALJ rendered the decision on September 26, 2006. Jayne interviewed Miller, performed a battery of tests, and also reviewed Miller's medical records (Tr. 386).

The results of the Functional Capacity Checklist, a 165-question test, showed that the following activities would be very difficult to impossible for Miller to perform

- Lifting relatively heavy objects
- Walking moderate distances
- Crawling under a table to pick up something
- Bending, reaching up to use a tool overhead
- Standing without shifting position for several minutes

(Tr. 389). The results of the Oswestry Pain Disability Questionnaire showed that pain prevents Miller from sitting or standing for more than one hour (Tr. 389).

In his assessment, Jayne found that the limitations placed on Miller from Dr. Hunter and Dr. Pence would place Miller "at a sedentary level of work capacity with additional limitations in bending, squatting, stooping, climbing, carrying, climbing, pushing, pulling, and twisting." (Tr. 392). These restrictions alone, Jayne opined, preclude Miller's ability to return to his past work as a project manager because that job requires Miller to be on his feet the majority of the day in constructions sites, to be on rough ground, and to drive significant distances (Tr. 392). The results of standardized tests showed Miller was in the below average range for non-verbal reasoning capacity and arithmetic computation (Tr. 392). Jayne found these results surprising considering Miller's past employment as a project manager, and opined that the low scores were likely the result of "increased fatigue, irritability, and frustration secondary to poor sleep and ongoing pain issues." (Tr. 393).

Jayne reached the following conclusion regarding Miller:

Based upon Mr. Miller's multiple limitations in physical capacities, pain, standardized test scores, medical diagnoses including low back pain with radiculopathy and rheumatoid arthritis, increased fatigue, irritability and frustration, and reported poor sleep, it is eminently clear that he is unable to perform any gainful work for which he reasonably fitted by education training or experience.

(Tr. 394). Jayne further stated that "it is unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success in returning Mr. Miller to competitive employability absent significant increase in physical capacities, reduction of pain, and an increase in his tested dexterities, arithmetic skills, and reasoning." (Tr. 394).

D. Hearing Testimony

ALJ Andrew Palestini held Miller's hearing on April 6, 2006. At the time of the hearing, Miller was 58 years old. In addition to Miller, vocational expert ("VE") Marian Jacobs also provided testimony at the hearing.

Miller testified that between May of 2000 and June of 2004, he experienced pain in his back and in his left leg, and that the pain in his back is more severe than that in his leg (Tr. 400-03). He testified that the pain in his back feels like "a knot in my back and then, feel it, lower back and then the go and radiate through the hips. And then, when it's real bad it goes around my left leg and in my foot and then, [INAUDIBLE] it didn't start till last year went down to my right." (Tr. 403). Miller testified that when his back hurt, he also experienced pain, numbness, and cramping in his left leg (Tr. 403). Miller's back pain is "somewhat, always there" and the pain in his left leg occurs when he overuses it (Tr. 404). Miller testified since June of 2004, his back pain has worsened (Tr. 404-05). Since June of 2004, Miller testified that he has developed rheumatoid arthritis in his hands and elbows (Tr. 417).

Miller described his daily activities as waking up, reading the newspaper, eating lunch, trying to shop or do something in the afternoon, eating dinner, and then watching

TV in bed (Tr. 406). He stated that he could sit for "a couple of hours" with normal breaks during a workday (Tr. 407). Miller stated that he could stoop and walk for a total of a couple of hours, with normal breaks, during a workday (Tr. 408). He testified that he can walk short distances, but cannot walk more than one block due to back and leg pain (Tr. 408). He stated that he could stand in one place for about 20 minutes (Tr. 409). Miller testified that he could lift 10 to 15 lbs. for two to three hours of the eight-hour workday, and less than 15 lbs. for five to six hours of the workday (Tr. 410). Miller testified that he can no longer lift a five-gallon gas can (Tr. 410). Miller testified that has problems bending over and twisting (Tr. 410-11).

Miller testified that he mows the lawn on his riding lawn mower for roughly 20 to 25 minutes weekly, with breaks, and bags the clippings, which weigh about 15 lbs. (Tr. 412-13). He said that he sometimes experiences pain after mowing the lawn (Tr. 413). Miller testified that he performs chores outside the home such as taking out the trash and sweeping out the garage and that he experiences pain when performing these chores (Tr. 413-15). Miller said that he still goes fishing for fish that weigh roughly two pounds, but not as often as he used to do (Tr. 415).

The ALJ propounded the following hypothetical question to Jacobs:

"I'd like the vocational expert to initially consider what effect it would have on the claimant's ability to perform work activity if his lifting was limited to more than 20 pounds occasionally, ten pounds frequently, but not above shoulder level. If he could sit for six to eight hours a day with normal breaks, stand or move about for two hours total in one day, could occasionally bend, squat, crawl, or kneel or stoop, or climb stairs, however ladders would be seldom. The claimant should also avoid repetitive twisting activities. With those limitations, would he be able to return to his past relevant work?

(Tr. 419). Jacobs testified that Miller would be able to return to his past relevant work with those restrictions (Tr. 419). Jacobs testified that Miller's past work is classified as

light, sedentary, and skilled (Tr. 419). Jacobs testified that Miller possessed skills that are transferable to other employment within the limitations set out by the ALJ (Tr. 419). Jacobs testified that Miller would be qualified to work as an accounting clerk supervisor, and that there are 570 of such jobs in Iowa and 70,000 in the nation (Tr. 420). Jacobs also testified that Miller could work as a "checker two" and that there are 190 of such jobs in Iowa and 19,000 in the nation (Tr. 420). Jacobs testified that Miller could work as a materials lister and that there are 660 of those jobs in Iowa and 69,000 in the nation (Tr. 420). Jacobs testified that Miller would not be able to perform the positions of an accounting clerk supervisor, "checker two", and materials lister if Miller had to change positions every thirty minutes (Tr. 420-21). However, Jacobs testified that Miller would be able to perform other jobs, besides those three, in the national economy (Tr. 421). Jacobs testified that, with the limitations laid out by the ALJ, plus the additional limitation of sitting not more than two hours a day, Miller would be precluded from any employment in the national economy (Tr. 421).

III. CONCLUSIONS OF LAW

A. Scope of Review

In order for the court to affirm the ALJ's findings of fact, those findings must be supported by substantial evidence appearing in the record as a whole. See Baker v. Barnhart, 457 F.3d 882, 892 (8th Cir. 2006). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." McKinney v. Apfel, 228 F.3d 860, 863 (8th Cir. 2000). The court must take into account evidence that fairly detracts from the ALJ's findings, as well as evidence that supports it. Id. (citing Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000). The court must consider the weight of the evidence appearing in the record and apply a balancing test to contradictory evidence. Gunnels v. Bowen, 867 F.2d 1121, 1124 (8th Cir. 1989); Gavin v. Heckler, 811 F.2d 1195, 1199 (8th Cir. 1987).

B. ALJ's Disability Determination

Determining whether a claimant is disabled involves a five-step evaluation. <u>See</u> 20 C.F.R. § 404.1520(a)–(f); Bowen v. Yuckert, 482 U.S. 137, 140 (1987).

The five steps are:

- (1) If the claimant is engaged in substantial gainful activity, disability benefits are denied.
- (2) If the claimant is not engaged in substantial gainful activity, her medical condition is evaluated to determine whether her impairment, or combination of impairments, is medically severe. If the impairment is not severe, benefits are denied.
- (3) If the impairment is severe, it is compared with the listed impairments the Secretary acknowledges as precluding substantial gainful activity. If the impairment is equivalent to one of the listed impairments, the claimant is disabled.
- (4) If there is no conclusive determination of severe impairment, then the Secretary determines whether the claimant is prevented from performing the work she performed in the past. If the claimant is able to perform her previous work, she is not disabled.
- (5) If the claimant cannot do her previous work, the Secretary must determine whether she is able to perform other work in the national economy given her age, education, and work experience.

<u>Trenary v. Bowen</u>, 898 F.2d 1361, 1364 n.3 (8th Cir. 1990) (citing <u>Yuckert</u>, 482 U.S. at 140–42); 20 C.F.R. § 404.1520(a)–(f)).

"To establish a disability claim, the claimant bears the initial burden of proof to show that he is unable to perform his past relevant work." Frankl v. Shalala, 47 F.3d 935, 937 (8th Cir. 1995) (citing Reed v. Sullivan, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the physical residual functional capacity (RFC) to

perform a significant number of other jobs in the national economy that are consistent with the claimant's impairments and vocational factors such as age, education and work experience. <u>Id.</u>

At the first step, the ALJ found that Miller had not engaged in substantial gainful activity since his alleged onset date (Tr. 16). At the second step, the ALJ determined that Miller had a severe combination of impairments, that being degenerative disc disease, history of fracture to left foot, hypertension, hypothyroidism, Raynaud's syndrome and rotator cuff tendonitis (Tr. 16). At the third step, the ALJ determined that Miller's impairments did not meet or equal one of the listed impairments (Tr. 16). At the fourth step, the ALJ determined that Miller could perform his past relevant work as a project manager (Tr. 19).

C. ALJ's Alleged Failure to Accord Controlling Weight to Dr. Pence's Opinion

Miller alleges that the ALJ improperly considered medical opinion evidence because the ALJ failed to give controlling weight to the opinion of Dr. Pence, Miller's chiropractor. Miller points to SSR 06-03p, 2006 WL 2329939 (Aug. 9, 2006), a Social Security ruling, as authority for the proposition that the ALJ should give controlling weight to Dr. Pence's opinion. The Commissioner contends the ALJ is required to give controlling weight only to the opinions of treating sources that are "acceptable medical sources," a group that does not include chiropractors under SSR 06-03p. Also, the Commissioner contends that whether Dr. Pence is considered to be an "acceptable medical source" or an "other source" is not relevant because the ALJ's opinion was consistent with the limitations propounded by Dr. Pence.

Pursuant to SSR 06-03p, "acceptable medical sources" are licensed physicians (medical or osteopathic doctors), licensed or certified psychologists, licensed optometrists, licensed podiatrists, and qualified speech pathologists. SSR 06-03p, 2006 WL 2329939 at *1. Thus, as a chiropractor, Dr. Pence does not constitute an "acceptable medical source." Dr. Pence is considered by the SSA to be an "other source." See Id. at *2 (Other sources

are "medical sources who are not 'acceptable medical sources,' such as . . . chiropractors . . ."). Only medical opinions from treating sources that are "acceptable medical sources" may be accorded controlling weight. See Id. at 2. ("Third, only 'acceptable medical sources' can be considered treating sources . . . whose medical opinions may be entitled to controlling weight." (citation omitted)). Because Dr. Pence is not an "acceptable medical source," his opinion, as a treating source, is not entitled to controlling weight from the ALJ. Thus, the Court finds that the ALJ properly considered medical evidence by not giving controlling weight to Dr. Pence's opinion.

D. ALJ's Alleged Failure to Consider If Miller Meets a Listing Under 1.04

Miller contends that the ALJ failed to adequately consider whether Miller met the requirements of a listed impairment. Specifically, Miller argues that the ALJ erred because he "failed to identify what listings were being considered and why they were not met." (Miller's Brief, 17). "When a claimant meets all the requirements of a listing, he is entitled to benefits without further inquiry into his ability to perform other work." Senne v. Apfel, 198 F.3d 1065, 1067 (8th Cir. 1999) (citing Sird v. Charter, 105 F.3d 401, 403 n.6 (8th Cir. 1997)). Miller contends that he meets the following listing:

- 1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, verbal fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:
- A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight leg raising test (sitting and supine); or
- 20 C.F.R. Pt. 404, Subpt. P, App. 1. Miller cites to parts of the record that he contends demonstrate he meets the listed impairment. The Commissioner argues that the ALJ

properly determined that Miller did not meet a listed impairment and that the ALJ was not required to elaborate on that finding so long as it was supported by the record.

The ALJ determined that Miller has a severe combination of impairments of degenerative disc disease, history of fracture to the left foot, hypertension, hypothyroidism, Raynaud's syndrome and rotator cuff tendonitis (Tr. 16). The ALJ found that Miller "does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1." (citation omitted). The fact that the ALJ did not mention a specific listing does not affect review. See Moore ex rel. Moore v. Barnhart, 413 F.3d 718, 721 n.3 ("The fact that the ALJ's decision does not specifically mention [a listing] does not affect our review. 'Although it is preferable that ALJs address a specific listing, failure to do so is not reversible error if the record supports the overall conclusion." (quotation omitted)). Furthermore, the ALJ is not required to elaborate on his conclusion that a claimant does not meet a listed impairment if the record supports his overall conclusion. See Karlix v. Barnhart, 457 F.3d 742, 746 (8th Cir. 2006) ("The fact that the ALJ did not elaborate on [his conclusion that the claimant did not meet a listed impairment] does not require reversal, because the record supports her overall conclusion") (citation omitted). Senne, 198 F.3d at 1067 ("We have consistently held that a deficiency in opinion-writing is not a sufficient reason for setting aside an administrative finding where the deficiency has no practical effect on the outcome of the case") (citation omitted).

Substantial evidence exists in the record to support the ALJ's conclusion that Miller did not meet all of the requirements under the 1.04 listed impairment. Miller's 2000 MRI results show that he suffered from stenosis and impingement (Tr. 203-04). However, the medical evidence regarding the remaining requirements under 1.04, such as limited spine motion and positive straight leg raise tests, is inconsistent (Tr. 148, 153, 159, 176, 324, 325). For example, Dr. Bengston noted on March 12, 2001, that Miller's "lumbar action range of motion is full and pain-free." (Tr. 159). However, on May 16, 2001, Dr. Janda

noted that Miller's lumbar flexibility was mildly to moderately restricted (Tr. 148). On November 2, 2000, Miller had a positive straight leg raise on the left side at 85-degrees (Tr. 176). However, on March 21, 2001, Miller had a negative straight leg raise bilaterally to 90-degrees (Tr. 159). Furthermore, Miller has not provided any evidence to show that he met the listing requirements for a continuous twelve-month period between May 2000 and June 2004 as is required by statute. 42 U.S.C. § 423(d)(1)(A); See also Karlix, 457 F.3d at 746-47. For these reasons, the Court affirms the ALJ's finding that Miller did not meet a listed impairment.

E. ALJ's Alleged Improper Consideration of Plaintiff's Credibility

Miller alleges that the ALJ improperly discredited Miller's subjective complaints of pain. Specifically, Miller contends that the ALJ improperly found that Miller's activity level did not support a finding of total disability and improperly considered Miller's physicians' and surgeons' recommendations against back surgery. The Commissioner contends that the ALJ's consideration of Miller's subjective complaints of pain were consistent with the Commissioner's regulations and policy.

Regarding Miller's credibility, the ALJ stated:

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, but that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible.

(Tr. 17). Furthermore, the ALJ stated that, "The objective medical evidence does not fully support the claimant's allegations . . . Mr. Miller has been able to maintain a level of activity that demonstrates a greater degree of functioning than alleged." (Tr. 18).

When evaluating the credibility of a claimant's subjective complaints, the ALJ may not disregard them "solely because the objective medical evidence does not fully support them." Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984). "The [ALJ] is not free

to accept or reject the claimant's subjective complaints solely on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole." <u>Id.</u> In evaluating claimant's subjective impairment, the following factors are considered: (1) the applicant's daily activities; (2) the duration, frequency and intensity of pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; and (5) functional restrictions. <u>Id.</u> at 1321-22.

Where an ALJ seriously considers but for good reasons explicitly discredits a plaintiff's subjective complaints, the court will not disturb the ALJ's credibility determination. Johnson v. Apfel, 240 F.3d 1145, 1147 (8th Cir. 2001). "An ALJ who rejects such [subjective] complaints must make an express credibility determination explaining the reasons for discrediting the complaints." Wagner v. Astrue, 499 F.3d 842, 851 (8th Cir. 2007) (quoting Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000)). "This court has repeatedly stated that a person's ability to engage in personal activities such as cooking, cleaning, or a hobby does not constitute substantial evidence that he or she has the functional capacity to engage in substantial gainful activity." Id. quoting Singh, 22 F.3d at 453. "In evaluating a claimant's RFC, consideration should be given to the quality of daily activities and the ability to sustain activities, interests, and related to others over a period of time and the frequency, appropriateness, and independence of the activities must also be considered." Id. quoting Leckenby v. Astrue, 487 F.3d 626, 634 (8th Cir. 2007). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." Pearsall v. Massanari, 274 F.3d 1211, 1218 (8th Cir. 2001).

The Court will not disturb the credibility determination of the ALJ. The ALJ made an express credibility determination and explained the reasons he discredited Miller's subjective complaints in his decision (Tr. 17-19). Miller's physicians' recommendations to pursue conservative treatment and forego back surgery was one of many factors in the ALJ's credibility determination. The Court finds that the ALJ appropriately considered that factor. The ALJ also considered the Polaski factors, including Miller's daily activities, the

frequency and intensity of pain that Miller experienced, precipitating and aggravating factors, and functional restrictions (Tr. 17-19). The ALJ properly considered Miller's activities, including mowing the lawn, performing light home maintenance, fishing, washing the windows, sweeping out the garage, and taking out the trash (Tr. 17, 19). The ALJ considered the quality and frequency of these activities, as well as Miller's ability to sustain those activities (Tr. 17, 19). Inconsistencies in the record as a whole between Miller's reported activities and his alleged degree of function support the ALJ's credibility finding. For these reasons, the Court finds that the ALJ properly determined Miller's credibility.

F. Alleged Inadequacy and Inaccuracy of ALJ's Hypothetical Question

Miller alleges that the hypothetical question posed by the ALJ to VE Jacobs failed to comprehensively describe and relate with precision Miller's functional limitations because the hypothetical did not contain any restrictions on sitting. In the hypothetical, the ALJ limited claimant's ability to sit to six to eight hours in an eight-hour workday, with normal breaks (Tr. 419).

A vocational expert's opinion is only relevant if the ALJ "accurately characterizes a claimant's medical conditions in the hypothetical questions posed to the vocational expert." Howe v. Astrue, 499 F3d 835, 842 (8th Cir. 2007) (citing Smith v. Shalala, 31 F.3d 715, 717 (8th Cir. 1994)). "A hypothetical, however, need only include impairments that are supported by the record and the ALJ accepts as valid." Id. (citing Prosch v. Apfel, 201 F.3d 1010, 1015 (8th Cir. 2000); Clay v. Barnhart, 417 F.3d 922, 931 (8th Cir. 2005)).

The Court finds that substantial evidence supports the ALJ's omission of sitting restrictions from the hypothetical question to VE Jacobs. Two physicians, Drs. Pence and Hunter, addressed Miller's functional capacity. Dr. Pence stated that Miller could perform "sedentary management positions - however sitting, standing, and [illegible] [illegible] limited due to disability." (Tr. 268). However, when explicitly asked on a form to limit

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Miller's ability to sit and drive, Dr. Pence indicated that Miller did not need to observe any limitations (Tr. 272). Dr. Hunter stated that Miller could sit for six hours of the eight-hour work day, with normal breaks (Tr. 303). Furthermore, Jayne, a vocational expert, did not place any sitting restrictions on Miller (Tr. 385-95). The ALJ properly discredited Miller's subjective complaint that he can is able to sit for two hours in an eight-hour workday because this restriction is not supported by Dr. Pence, Dr. Hunter or Jayne (Tr. 407). For these reasons, the Court finds that the ALJ's hypothetical comprehensively described and related with precision Miller's functional limitations.

Upon the foregoing,

IT IS ORDERED that the decision of the Commissioner of Social Security is hereby affirmed. This matter is dismissed. The Clerk of Court shall enter judgment accordingly. **DATED** this 22nd day of September, 2008.

SOUTHERN DISTRICT OF IOWA